ARJUNAN A/L RAMASAMY & 9 ORS.

v.

KESATUAN KEBANGSAAN PEKERJA-PEKERJA LADANG & 12 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL SUIT NO. D4-22-789 OF 1992]
27 JULY 1992

INJUNCTION: Anton Piller order - Application to set aside - Whether order should have been granted - Principles applicable.

PRACTICE AND PROCEDURE: Application to strike out writ and statement of claim - Non-compliance with rules - Order 18 r. 19 RHC 1980 - Effect.

TRADE UNIONS: Trade dispute - Whether High Court has jurisdiction to hear matter.

The plaintiffs as members of the first defendant filed a writ seeking various declarations and obtained an Anton Piller order on an *ex parte* basis. The defendants applied to set aside the order and to strike out the writ and statement of claim.

The defendants contended that the Court had no jurisdiction to entertain this suit as the dispute between the plaintiffs and defendants was governed by the provisions of the Trade Unions Act 1959.

The defendants further contended that the Anton Piller order was with regard to documents which the defendants were statutorily duty bound to keep and as such the plaintiffs fear that they may be destroyed or tampered with had no basis whatsoever.

The defendants also contended that as police reports had been lodged alleging criminality on the part of the defendants, any disclosure might incriminate them and that therefore they were entitled to the privilege not to give discovery of the documents.

Held:

[1] The urgency that the evidence will be destroyed or dissipated if an Anton Piller order was not granted was absent in this particular instant. The Anton Piller was not a proper remedy in this case.

[2] The matters sought to be disclosed by the plaintiffs include statement of accounts of the Union required to be maintained by them under s. 55 of the Trade Unions Act which section provides a criminal penalty for any failure on the part of the defendant. The defendants are entitled to privilege from discovery of the documents.

[3] The disputes between the plaintiffs and the defendants come within the ambit of disputes as defined in s. 44 of the Trade Unions Act and shall be decided in the manner directed by the rules of the Trade Unions and the decision so given shall be binding on all parties and the order of enforcement thereof may be made to the Sessions Court.

[4] A declaratory judgment cannot be given by the Court in the exercise of its original jurisdiction where the remedy open to the plaintiffs is one prescribed by statute.

[5] The defendants non-compliance with O. 18 r. 19 RHC 1980 was not fatal to its application.

[Anton Piller order discharged. Writ and statement of claim struck off. Costs to the defendants to be taxed]

Cases referred to:

WEA Records Ltd. v. Visions Channel 4 Ltd. & Ors. [1983] 1 WLR 721 ***(refd)***

P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors. [1985] 1 MLJ 86 ***(foll)***

Rank Film Distributors Ltd. & Ors. v. Video Information Centre & Ors. [1980] 2 All ER 273 (CA) ***(foll)***

Electrical Industry Workers Union v. Registrar of Trade Unions & Anor. [1976] 1 MLJ 177 ***(refd)***

Periasamy s/o Karuppan & Ors. v. National Union of Plantation Workers & Ors. [1975] 2 MLJ 108 ***(refd)***

Nor Azlan bin Mad Azros & Anor. v. Hj. Jumaat Yusoff (President) & 9 Ors. [1990] 2 ILR 206 ***(foll)***

RCA Sdn. Bhd. v. Pekerja-Pekerja RCA Sdn. Bhd. & 15 Ors. [1990] 2 ILR 413 ***(refd)***

Legislation referred to:

Trade Unions Act 1959 (Act 262), ss. 15(1)(b), 44(1), 44(5), 55(3), 57(3), 60(1), 60(3)

Rules of the High Court 1980, O.2, O. 2(3), O. 18 r. 19(a), (b), (c)

For the plaintiffs - N. Navaratnam (R. Sivarasa with him); M/s. Sivarasa & Associates

For the defendants - B. Lobo (D. Kalaimany with him); M/s. Kalai & Partners

JUDGMENT

Hj. Abu Mansor bin Ali J:

The plaintiffs are members of the first defendant Kesatuan Kebangsaan Pekerja-Pekerja Ladang or National Union of Plantation Workers (NUPW) and the other defendants are the officers of the NUPW. It started when the plaintiffs, so it seems, were unhappy with how the NUPW conducted the affairs of the Union. The plaintiffs then wrote for the minutes of meeting of the Union. When, according to the plaintiffs, they were not forthcoming the plaintiffs filed a writ and statement of claim praying for declarations as follows:

(a) a declaration that the second to thirteenth defendants are in breach of their fiduciary duties to the plaintiffs;
(b) an order that the second to thirteenth defendants be restrained and an injunction be granted restraining them whether by themselves, their servants or agents or otherwise howsoever from transferring, disposing of, mortgaging, assigning, charging, or diminishing in any way or otherwise dealing with howsoever any of the assets of the first defendant and in particular from proceeding further in any way howsoever with the proposed redevelopment of the P.P.N. Hostel at No.1, Lorong Utara "B", sek. 27, Petaling Jaya;
(c) an order that the first defendant and second to tenth defendants be restrained and an injunction be granted restraining them, whether by themselves, their servants or agents or otherwise howsoever from expelling or suspending or continuing to suspend or expel the first, third, seventh and eighth plaintiffs from the membership of the first defendant.
(d) an order for an account to be taken of the receipts and payments, income and expenditure and assets and liabilities of the first defendant from 1985 to 1992;
(e) damages against the defendants for loss and damages arising out of their breach of contract and fiduciary duty to the plaintiffs;
(f) an order directing the second to thirteenth defendants to pay to the first defendant and/or reimburse the first defendant's account such sums as may be found upon enquiry and taking of accounts to be due and payable by the same to the first defendant;
(g) such further or other orders, relief, remedies or directions as this Honourable Court may deem fit to order in the circumstances of this matter;
(h) costs.

Following the filing of the writ the plaintiffs applied for an Anton Piller order for the supply of the matters referred to in the orders dated 3 June 1992. When the plaintiffs served a copy of the said orders on the defendants at their premises, the defendants did not obey the orders forthwith but instead sought legal advice. After obtaining legal advice the defendants refused to obey the said orders. They instead filed their application in enclosure (8) seeking to set aside the order dated 3 June 1992 and also to set aside the writ and the statement of claim filed. The plaintiffs also filed a Notice of Motion for committal of the 8th, 9th and 10th defendants as officers of the first defendant. I proceeded to hear enclosure (8) in Open Court and postponed the hearing of the other applications to a later date. The defendants' application in enclosure (8) is supported by the statement containing the grounds of that application.

Mr. Lobo for the defendants/applicants raised the question of the absence of jurisdiction of the High Court to entertain the type of action as the one before me.

The defendants also raised the question of the appropriateness of the order sought to be impugned. In the normal run of cases, Anton Piller orders would only be issued if the defendants have incriminating documents and there is a real possibility such evidence may be destroyed if the order is not granted. The defendants say it is not appropriate when the defendants by the Trade Unions Act or their regulations are required to maintain their documents and accounts. The argument that there is urgency just falls to the ground, the defendants submit.

As to the propriety of the defendants' application following the case of *WEA Records Ltd. v. Visions Channel 4 Ltd. And Others* [1983] 1 WLR 721 the defendants may refuse immediate compliance of this order obtained *ex-parte* and make an urgent application to have the order set aside. This is the course of action being pursued by the defendants but at their peril for if the defendants fail then they could be guilty of contempt.

In Counsel for the applicant's submission he gave a common submission at one go to ask for both the Anton Piller order and the writ to be set aside.

Defendant's Counsel submitted that if the application is scrutinized it would be clear that there is no basis for the application. Counsel submits that as for the 1st plaintiff requiring the details of the illegal loan to GATCO for period of accounting from 1986 to 1990, it is a fact that according to para 10 of enclosure (7) the 1st plaintiff was sitting in the Executive Council of the 1st defendant from 1980 to 1988. The first plaintiff therefore would have had full access to these accounts.

Then in exhibit "A" enclosure (4) page 3 the plaintiffs spoke of some irregularities in the account of the 1st defendant. There is evidence that the accounts had been audited by Rabin & Co. and from the finding of Rabin & Co. the position of the account is far from clear. The defendant's Counsel submitted that since these documents are statutory documents, the defendants are duty bound to keep them. The plaintiffs' fear that they may be destroyed or tampered with has no basis whatsoever. He submitted that the plaintiffs have a simple remedy if they suspect illegality namely, to complain to the Registrar of Trade Unions who acts as the policing body for all trade unions and the allegations of unauthorised and unlawful expenditure by the 1st defendant may be investigated as the accounts must have been in accordance with s. 55(3) of the Trade Unions Act (Act 262) which reads:

> (3) The account shall be verified by statutory declaration, and the union shall cause the account to be audited by some fit and proper person approved by the Registrar.

Mr. Lobo further submitted that in addition to the above the plaintiffs may also have recourse to s. 57(3) and apply to the Registrar and under s. 57(3):

> the Registrar may either acting for a member or on his own behalf order the account books and other records of a trade union to be made available for inspection or audit by a fit and proper person approved by him.

He says further that under s. 60(1) of the said Act complaint can be made to the Sessions Court if any officer, employee or member of any union has unlawfully expended or withheld any money of the union, the Court shall order delivery of such money or property to the trustees of the union and under s. 60(3) makes it a criminal offence if the order is not obeyed. He submitted that in view of s. 44(1):

> (1) Every dispute between -
>
> (a) a member or person claiming through a member or under the rules of a registered trade union or any branch thereof, and the union or any branch thereof or an officer thereof;
>
> (b) any person aggrieved who has ceased to be a member of a registered trade union or any branch thereof, or any person claiming through such person aggrieved, and the union or any branch thereof, or an officer thereof;
>
> (c) any registered trade union and any branch thereof;
>
> shall be decided in the manner directed by the rules of the trade union, and the decision so given shall be binding and conclusive on all parties; and application for the enforcement thereof may be made to a Sessions Court.

Then under s. 44(5)

> (5) Where the rules of a registered trade union direct that disputes shall be referred to the courts, the dispute shall be determined by a Sessions Court.

Counsel submitted further that where Parliament has designated a form for settlement of disputes, the plaintiffs' application for an Anton Piller order was misconceived as far as the trade union is concerned.

Mr. Lobo submitted another ground why the Anton Piller order should be discharged in that, police reports have been made alleging criminal matters and dissipation of assets and he submitted that on the authority of *P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors.* [1985] 1 MLJ 86 where Dato' Zakaria Yatim J. applied the principles in *Rank Film Distributors Ltd. & Ors. v. Video Information Centre & Ors.* [1980] 2 All ER 273 (C.A.) and held that the defendants were entitled to the privilege not to give discovery of documents, as the disclosure would incriminate them and allowed the defendant's application not to give discovery of documents, (the defendants were entitled to privilege from discovery).

The defendants also submitted that in the application to obtain the Anton Piller order there was suppression of the following facts:

(a) The account of the defendants sought to be discovered was from 1986 to 1990 and from 1986 to 1988 the 1st plaintiff was a member of the 1st defendants' EXCO and he participated in the decision making of the lst defendant. The defendants submitted further that the 1st plaintiff was not motivated by an honest and genuine intention. He waited and only after he lost the election did he become chairman of the Reformation Committee.

As for the plaintiff's writ asking for declarations the defendants' Counsel urged on the Court that the application should not be granted. He cited the Federal Court's case of *Electrical Industry Workers Union v. Registrar of Trade Unions & Anor.* [1976] 1 MLJ 177 where H.S. Ong F.J. spoke of the undesirable consequence of declaratory orders:

> There is also, as Zamir says in The Declaratory Judgment (1962) pages 47-48, the undesirable consequence that such declaratory orders may, in subsequent proceedings upon the subject-matter of the opinion, embarrass the Courts which would hardly be able to ignore it, and cause confusion and uncertainty to future litigants ...
>
> ... I am of the opinion that what the Court is being asked to do is to define and draw up guidelines for the Registrar as to his functions under the Ordinance and the manner he is to carry them out. This, I do not think, this Court should do.

Counsel urged this Court not to entertain this writ. This is especially so because the plaintiffs had already sought the help of the Director-General (see enclosure (4) para l9(a) and para 32). If the Director-General should act on the plaintiffs' action it might even result in the winding-up of the union under s. 15(1)(b). The defendants say what the plaintiffs seek to do by declaration is to usurp the function of the Registrar. This, the defendants say, should not be allowed.

The defendants Counsel also cited *Periasamy s/o Karuppan & Ors. v. National Union of Plantation Workers & Ors.* [1975] 2 MLJ 108 where members of a trade union sought an injunction to restrain the defendant from holding office without having referred the matter to the Registrar of Trade Unions. Abdul Hamid J (as he then was) held that the applicants should have exhausted all domestic remedies before coming to Court.

The defendants' Counsel cited *Nor Azlan bin Mad Azros & Anor. v. Hj. Jumaat Yusoff (President) & 9 Ors.* [1990] 2 ILR 206 where my learned brother Shankar J. in a dispute between union members and the Union, the plaintiffs not having complied with s. 40, 44(6) and 44(9) of the Trade Unions Act 1959, held that where there is a remedy prescribed by statute a declaratory judgment cannot be given and he struck off the suit.

Then finally the defendants' Counsel cited the decision of the Supreme Court in *RCA Sdn. Bhd. v. Pekeria-Pekeria RCA Sdn. Bhd. & 15 Ors.* [1990] 2 ILR 413 giving guidance to us in similar vein to the Electrical Industry Workers Union's case above that the granting of the injunction may cause embarrassment to the Minister and to Courts as canvassed in that case.

The defendants' Counsel prays that for the reasons stated the Anton Piller order be discharged and the writ be struck out.

On the first issue whether the Court has or has no jurisdiction, Mr. Navaratnam for the respondent/plaintiffs contended that none of the remedies in the writ filed by the plaintiffs gave what the plaintiffs prayed for, a declaration that the defendants are in breach of their fiduciary duties and action for an account for damages for such breach. He said none of these matters are covered by the Trade Unions Act and therefore the plaintiffs have come to this Court. Plaintiff's Counsel complained that the defendants did not comply with the Anton Piller order.

I had to consider the first issue whether the Court has jurisdiction to so entertain the writ and the application for Anton Piller order. I will deal with the application for an Anton Piller order. I find merit in the argument of the defendant's Counsel that an Anton Piller should not have been granted in the first place.

I am of the view that the instances where Anton Piller orders have been issued by the Court are where there is great possibility that certain evidence or property are about to be dissipated and if an Anton Piller order was not immediately issued then there is great possi-

bility that such evidence or property are going to be destroyed, dissipated or taken out of the Court's jurisdiction.

I consider that no such factors are present in this case that justified the issue of such an order. I considered it is true, as submitted to me, that the matters required to be disclosed to the applicants are matters which the union is by statute required to preserve, such as minutes books and records of account which are open for inspection of members and I agree with the construction submitted before me by the defendants that if the plaintiffs had not tried to obtain them free of charge, for which they are not so entitled, copies would have been provided by the defendants. On this matter it is clear to me that some misunderstanding has arisen between the plaintiffs and the defendants over the supply of copies to whatever documents are required but whatever it is, it is quite clear to the Court that the defendants are not stopping the plaintiffs from inspecting the documents or records but the defendants are not willing to supply copies of them without any payment whatsoever. The word "supply" as used by the defendants in their letters of reply can quite clearly be interpreted as supply free of charge.

As for the allegation that these records of the defendants can be tampered with I am of the view that the chances of that happening are remote. I hold that view because they concern records which are not exclusively kept by the defendants. They are records which are also kept or they are transactions or dealings with third parties for example in the Union paying to GATCO or valuation reports obtained by them of properties mortgaged which transactions are matters of complaint by the plaintiffs. I am of the firm view that these dealings with outsiders other than the Union cannot be falsified and if they are their falsity can be easily discovered through records in the custody of the outsiders the Union deals with.

I therefore rule that the urgency that the evidence will be destroyed or dissipated if an Anton Piller order is not given is absent in this particular instant. On this ground alone I am justified in exercising my discretion in holding that the Anton Piller was not a proper remedy in this case and the defendants succeed in their application to have the Anton Piller discharged.

On the issue that the defendants may claim privilege from disclosure of materials which may incriminate them in criminal prosecutions the plaintiff 's Counsel contend that the case of *P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors.* [1985] 1 MLJ 86 R1 page 67 does not apply to this case as the materials sought to be disclosed pertain to civil cases only. I find merit again in the argument of the defendant's Counsel and hold that the *P.M.K.*'s case is relevant and I apply that case. The matters that are sought to be disclosed by the plaintiffs apart from minutes of the Union meeting include statement of accounts of the Union required to be maintained by them under s. 55 of the Trade Unions Act. Under s. 55(3) the account shall be verified by statutory declaration and if not true will subject their members to prosecutions. What is stated by plaintiff's Counsel that it would only be for civil cases is not true. I hold that *P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors.* [1985] 1 MLJ 86 (R1) page 67 will apply and I therefore discharge the Anton Piller order granted.

I come now to consider the defendant's application to set aside the writ and statement of claim on the ground of absence of jurisdiction of the High Court by virtue of statutory provision. To this the plaintiff's Counsel contended that the High Court has jurisdiction to entertain the writ. The matters under their claim fall outside the scope of the Trade Unions Act. The claim was for breach of fiduciary duty of the defendant and their executive officers and trustees.

The plaintiffs say that the defendants have followed the wrong procedure and failed to state the grounds in the application to set aside the writ and the statement of claim. The defendants reply that the plaintiffs replied to the Notice in enclosure (8) and never objected to the application until the date of argument.

I find merit in the contention of the plaintiffs that the defendants had not followed the proper procedure to have the writ and the statement of claim set aside. The procedure for it is 0. 18 r. 19 where the applicant is required to state in the Summons either (a)(b) or (c) of 0. 18 r. 19:

> 19.(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process .of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (l)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

An applicant like the defendants therefore are required to state the grounds he is proceeding under and if he is proceeding on the ground under paragraph 1(a) no evidence shall be admissible and all affidavit evidence shall be disallowed.

I find that O. 2 of the Rules of the High Court 1980 now has provision for effect of non-compliance with the said rules which has the effect of not adhering strictly to forms of beginning a process. O. 2(3) provides:

3. The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

I find it was not fatal that the defendant/ applicant did not use the grounds spelt out in O. 18 r. l9(a)(b) and (c).

The complaints of the plaintiffs here, so they contend, do not come under the Trade Unions Act, they were claiming by way of declaration that the defendants are in breach of their fiduciary duty. When asked how is that they did not, the answer to that question is they do not adhere strictly and faithfully to the Trade Unions Act, they alleged that the executives went outside their powers.

I make a finding that the disputes between the plaintiffs and the defendants come within the ambit of disputes as defined in s. 44 of the Trade Unions Act and shall be decided in the manner directed by the rules of the Trade Union and the decision so given shall be binding on all parties and the enforcement thereof may be made to a Sessions Court.

I find that there is merit in the argument of the defendant's Counsel's submission that there is absence of jurisdiction. The matter of this dispute is regulated by the provisions of the Trade Unions Act for instance it may be referred to the Director-General of Trade Unions or it may be settled by arbitration. All in all I find that there is a comprehensive Act to govern all aspects of the activities of the defendants including the Union Funds. I am in agreement with the authority of *Nor Azlan bin Mad Azros & Anor. v. Hj. Jumaat Yusoff (President) & 9 Ors.* [1990] 2 ILR 206 where Shankar J. at page 208 said, "It is trite law that a declaratory judgment cannot be given by the Court in the exercise or its original jurisdiction where the only remedy open to the plaintiff is one prescribed by statute". I adopt that view in a similar situation of disputes between members and the Executive Council (EXCO) of the Union and hold that it is trite law that a declaratory judgment cannot be given by the Court in the exercise of its original jurisdiction where the remedy open to the plaintiff is one prescribed by statute.

For these reasons I allow the defendant's application and I dismiss the writ or case with costs to be taxed and paid by the plaintiffs to the defendants.